ployment will be terminable on one month's notice on either side, then the Government may at any time terminate his service by serving the requisite notice. It may well be that in certain cases misconduct, inefficiency, or other disqualifidation is the motive which influences Government to take action under the terms of the contract, but as long as the termination is founded on the right flowing from the contract then prima facie the termination is not a punishment within the meaning of art. 135(2). The motive which sets the Government machinery in motion is irrelevant (see *Shrinivas Ganesh* v. *Union of India*)."

(See also the case of *P.L. Dhingra* v. *Union of India*[2]).

In the present case counsel for the appellant conceded that Article 132(2) did not apply, nevertheless, he said that the termination attracted the application of Regulation 47 because it was a colourable termination on ground of unsatisfactory work and conduct. It may well be the respondent was influenced or motivated by the unsatisfactory work and conduct of the appellant when a decision was taken to terminate the services of the appellant but the heart of the matter is that the respondent was lawfully entitled to exercise the right to terminate in accordance with the express terms of the appointment, and it was immaterial that it was also open to the respondent to adopt an alternative method to terminate the appellant's services.

In support we would also refer to the case of the *Government of Malaysia* v. *Lionel*[3] where it was held that "under the laws of Malaysia a distinction is drawn between dismissal and termination of services and there is nothing in the Constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement. The Board could not agree with the Federal Court that Regulation 36 of the General Orders was invalid and inconsistent with the Constitution." Our view is that it is immaterial that there is no regulation similar to Regulation 36 in the 1968 General Orders. We are concerned here with the right of the Government that flows from a contract entitling it to terminate the appointment under the terms and in accordance with that contract.

The appellant's other contention that the termination was a colourable termination amounting to dismissal is completely irrelevant for the sole reason that there is no question whatever here of any involvement of a penal element. The learned judge in the court below found, very properly, that

"no evil consequence arose in the case of the plaintiff because under the terms of her appointment, she was not eligible on her termination for a pension or other form of eligibility other than what was stated in the terms of her appointment."

In *Mahan Singh* v. *Government of Malaysia*[4] Lord Diplock delivering the judgment of the court at page 135, speaking of *Lionel's* case, had observed as follows:

"Lionel's case was one in which the first part of this requirement was satisfied; his conduct was regarded as blameworthy. But the second part of the requirement, that there should be a penal element in the consequences of his dismissal, was not. He was a temporary clerk, not on the permanent establishment, but engaged on terms under which his services could be terminated on one month's notice or salary in lieu; and this was given to him. He was treated no differently from the way he would have been if his conduct had been impeccable and the Government had wished to dispense with his services because they had no longer any need for them."

Finally the only remaining issue for us to deal with is the appellant's contention that the notice of termination of June 30, 1969 backdating the termination to April 1, 1969 was a breach of the terms of the appointment. It is pointed out that it was also not served during the period of appointment. The learned judge found that in this particular case the appellant refused to comply with the transfer order and failed to report for duty on April 1, 1969 at the new station in Temerloh. Clearly the appellant had herself breached the terms of the appointment, in particular in the light of conditions (e) and (f) as follows:—

"(e) That you are at all times subject to Government General Orders, Circulars and other administrative instructions as may from time to time be issued relating to the work, conduct and Conditions of Service of officers in the Public Service.

(f) That you will be liable to be employed in any part of the State of Pahang."

By her failure to report for duty as ordered, she in fact vacated her appointment. Although the termination notice was given with retrospective effect, it did not at all prejudice the appellant for she herself had ceased work. By her own admission, it was clear that it was for personal reasons that she refused to comply with the order.

Although we find it difficult to understand, indeed, are puzzled that the respondent had chosen to wait until that date to notify the appellant of the termination of the appointment, we however fail to see any ground for appellant to complain. A cause of action, indeed there was, would lie against the appellant. It was open to the respondent to make a claim against the appellant arising from the breach of the express term of appointment for her refusal to obey a lawful order.

We see no merit whatever in this appeal and we accordingly dismiss it with costs.

Appeal dismissed.

Solicitors: *G.T. Rajan & Co.*

TAN CHIN KIM SAWMILL AND FACTORY SDN. BHD. v. LINDETEVES-JACOBERG (M) SDN. BHD.

[F.C. (Raja Azlan Shah C.J., Wan Suleiman & Salleh Abas F.JJ.) June 24 & September 5, 1981]
[Ipoh — Federal Court Civil Appeal No. 58 of 1980]

Commercial Law — Lease financing for industrial equipment and machinery — Leasing — Guarantee — Machinery delivered — Whether property passes — Breach of contract — Damages — Bills of Sale Ordinance, 1950 — Sale of Goods (Malay States) Ordinance, 1957, ss. 19, 20 & 23 — Companies Act, 1965, s. 108.

Commercial Law — Equipment leasing.

Contract — Breach of contract — Guarantee — Damages — Measure of — Contracts Act, 1950, ss. 74 & 93.

In this case the first plaintiff company (the appellant in the appeal) owned a sawmill and the second plaintiff was the chairman of the company. The first plaintiff company required additional machinery to expand its operations and placed four orders with the first defendant (the respondent in the appeal) for the supply of the machinery. Payment was stated in the orders to be by leasing to be arranged with a credit corporation. The leasing arrangements with the credit corporation fell through and the first plaintiff company

through the second plaintiff then arranged for leasing facilities with the second defendant (MIMB). It was agreed in effect that the first defendant would sell the machinery to the second defendant which would in turn enter into a five year lease of the machinery with the first plaintiff company subject to the first defendant guaranteeing all payments due to the second defendant under the leasing arrangement to be entered into by the first plaintiff company and indemnifying the second defendant against all loss, damage, costs and expenses incurred or suffered and purchasing the machinery on the termination of the lease. The first plaintiff company defaulted in its dues for the lease rentals after making two payments and eventually the second defendant terminated the lease agreement and the first defendant acting as agents for the second defendant repossessed the machinery. The first defendant pursuant to the agreements purchased the machinery and indemnified the second defendant against all loss, damages and expenses incurred in the sum of $527,039.37. The plaintiffs sought a declaration (a) that the documents relating to the lease are bills of sale and therefore void under the Bills of Sale Ordinance, 1950 and (b) that the lease documents were a sham and invalid and of no effect. At the trial the plaintiffs indicated that they would not proceed with the claim based on the Bills of Sale Ordinance, 1950. The first defendant counterclaimed for the sum of $415,572.10 that is $527,039.37 which it paid to the second defendant plus $165,660.73 for loss and expenses incurred, less the sum of $277,128 realised from the sale of the machinery.

The learned trial judge dismissed the plaintiffs-appellant's suit but upheld the counterclaim of the first defendant-respondent in the sum of $403,048.75. The appellant appealed against the decision of the learned judge in respect of the counterclaim only.

It was argued on behalf of the appellant that the respondent should not have paid the amount of $527,039.27 to the Malaysian International Merchant Bankers Berhad (MIMB) (the second defendant) as it was under no obligation to do so on the ground that firstly upon termination of the lease agreement for non-payment of the rentals due, only the rental amounts due up to the date of the termination were payable and no more and that secondly the guarantee undertaking given by the respondent to MIMB did not entitle the latter to recover damages and losses beyond the rentals which had fallen in arrears and that thirdly MIMB should have acted under its sale agreement by asking the respondent to purchase back the equipment at the agreed price of $45,442.80. It was also argued that the appellants were under no obligation to pay the sum of $165,660.73 which was claimed as the respondent's own losses, costs and expenses.

Held: (1) it was clear in this case that the intention of the parties was that MIMB was to be compensated not only for the sums of money which would become due and payable by the appellant but also for all losses, damages costs and expenses suffered by MIMB;

(2) it was also clear that the three parties intended that MIMB should have recourse against the respondent not only as regards non-payment of rentals by the appellant but also as regards all losses damages costs and other expenses which MIMB had incurred or suffered as a result of the termination of the leasing. The undertaking given by the respondents consisted of (a) guarantee for the payment of rentals and (b) an indemnity against all losses, damages, costs and expenses;

(3) Disposal of the equipment was a matter only between MIMB and the respondent; the appellant as a hirer having no option to acquire the equipment. The appellant could not therefore complain if MIMB upon the termination of the lease agreement elected not to act upon the sale agreement;

(4) if the sale agreement, the lease agreement and the guarantee and indemnity are read together as one instrument there is nothing that would justify the conclusion that MIMB could recover only the agreed price of $45,422.80;

(5) the learned judge was therefore correct in holding that the respondent was entitled to the recoupment of the amount of $527,039.37 representing the losses damages costs and expenses suffered or incurred by MIMB, which the respondent in turn had paid MIMB;

(6) the losses claimed by the respondent flowed from the default of the appellant in paying the rentals, which eventually led to the termination of the lease agreement. The respondent was entitled to recover these losses from the appellant under section 74 of the Contracts Act, 1950.

Case referred to:-

(1) *Financings Ltd.* v. *Baldock* [1963] 2 Q.B. 104.

FEDERAL COURT.

N.T. Rajah for the appellant.

P. Mooney for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J.: On December 4, and 18, 1973, the appellant placed four orders with the respondent for the supply of certain sawmill equipment. Payment for the equipment was stated in these orders to be by way of five year leasing arrangements with Credit Corporation (M) Bhd. (CCM). The equipment was subsequently delivered to the appellant for a total price of $454,428.

For the next eighteen months or so the respondent was looking for a financier to finance the leasing arrangements in order to get paid the price of the equipment. In the meantime on April 25, 1975 the appellant and the respondent entered into a written agreement whereby in consideration of the respondent undertaking to complete leasing arrangements of the equipment with either CCM or Malaysian International Merchant Bankers Bhd. (MIMB) and to guarantee payments by the appellant of all sums of money which would become payable to either CCM or MIMB up to a limit of $454,428, the appellant agreed to create second charges over its lands in favour of the respondent. The charges were duly executed on April 15, May 18 and July 20, 1976.

Leasing arrangements with CCM proved abortive and so the respondent turned to MIMB for finance. MIMB however, was prepared to enter into leasing arrangements provided that the terms stated in its letters dated June 2, 1975 were acceptable to both the appellant and the respondent. It was upon acceptance of these terms by both of them that a set of three legal instruments was finally executed on June 19, 1975. These instruments are (1) a lease agreement between MIMB and the appellant (2) a guarantee and indemnity undertaking given by the respondent to MIMB and (3) a sale agreement between the respondent and MIMB. The basic features of the leasing arrangements are as follows: —

(1) To start with, MIMB bought the equipment from the respondent at the price of $454,428. This purchase was done on September 13, 1975.

(2) Having purchased the equipment MIMB as owner leased the equipment to the appellant for a period of 60 months (5 years) at a monthly rental of $10,990. The rent was to be paid in advance on the first day of the month to which the rent related.

(3) During the lease period the appellant as hirer had no right to terminate the lease, but MIMB as owner had such right exercisable upon the happening of certain events, one of which was a default by the appellant to pay the rental due within seven days from the date on which it became due.

(4) The respondent was required to guarantee to MIMB for the due payment by the appellant of all sums of money which would become due and payable and also to indemnify MIMB against all losses damage costs and expenses incurred or suffered by MIMB. The guarantee and indemnity undertaking was subsequently given by the respondent, and

(5) To distinguish the lease from a normal hire-purchase agreement, the hirer, i.e. the appellant had no option to purchase the equipment either at the end of the lease or at its earlier termination. The option to purchase was given to the respondent at a price of $45,442.80, i.e. at 10% of original price irrespective of whether the purchase was at the end of the lease or at its earlier termination.

The lease commenced on September 13, 1975, the date when MIMB had fully paid up the price of the equipment to the respondent and thus became the owner.

From the start the appellant showed signs of its inability to keep up with its commitments under the lease agreement. The first monthly rental (October) was not paid on time but only on October 23, 1975 and even here the cheque sent for the rental was post-dated to October 31, 1975. The appellant defaulted in the second monthly rental (November), and this was not paid until January 7, 1976. It further defaulted in the payments of the third (December), the fourth (January) and the fifth (February) monthly rentals. Finally on March 3, 1976 MIMB terminated the leasing under Clause 8 of the General Conditions of the Leasing, which were incorporated as an integral part of the lease agreement. The sum owing to MIMB together with interest and other charges as on the date of termination was $35,321.38, of which $32,970 was the amount of rentals due. On the same date MIMB appointed the respondent to be its agent for the purpose of repossessing and subsequent sale of the equipment, and by letters dated March 22, 1976 it informed the appellant and the respondent that the cash price of the equipment for settlement on April 1, 1976 was $83,244.43 and that if the settlement was to be made on April 1, 1977, the cash price was $533,985.10. It further informed the respondent that in the event of the appellant's inability to make the settlement on April 1, 1976, the respondent was offered back the equipment at these prices. The respondent accepted the second price and on February 11, 1977 the respondent paid MIMB $527,039.37, a lesser amount presumably because of the rebate granted on account of accelerated payment.

As the leasing arrangements were terminated, the appellant and the respondent were back to their original positions before the leasing. The respondent as the supplier was requiring payment for the equipment and the appellant was to look for finance elsewhere to pay for this equipment. After some correspondence between them, the appellant made an offer on July 1, 1976 to the respondent to pay for the equipment in the following terms: —

$35,000	by the end of July 1976
$100,000	by the end of September 1976
$100,000	by the end of December 1976, and
the balance	by the end of March 1977.

The appellant failed to keep up with this offer. The equipment was finally repossessed and sold by the respondent for $277,128.

Finally on March 31, 1977 the appellant took out a writ against the respondent and MIMB asking for damages cost and other relief on the ground that the leasing arrangements with MIMB and the charges which it executed in favour of the respondent were both null and void. The respondent and MIMB resisted the suit and in addition thereto, the respondent counterclaimed from the appellant a net amount of $415,572.10, being the amount of money which the respondent had paid to MIMB under the guarantee agreement and damages and loss which it itself had suffered as a result of the appellant's failure to perform the lease agreement.

The learned judge dismissed the appellant's suit but upheld the counterclaim of the respondent in the sum of $403,048.75. The appellant therefore now appeals to us against the decision of the learned judge and the appeal is in respect of the counterclaim only.

The counterclaim consisted of (1) an amount which the respondent paid under its guarantee and indemnity undertaking to MIMB as representing the losses and damages costs and expenses which MIMB had suffered and incurred; and (2) an amount representing losses, damages, costs and expenses which the respondent itself had suffered and incurred as a result of the appellant's failure to perform its obligation under the lease agreement. The first amount was $527,039.37 and the second was $165,660.73. The aggregate of these two amounts was reduced by a sum of $277,128 realised from the sale of the equipment thus giving the net counterclaim of $415,572.10. At the trial there was a further reduction of $12,523.35 in respect of interest which counsel for the respondent said was wrongly brought into computation. The resulting figure allowed by the learned judge was $403,048.75.

Counsel for the appellant submitted that the respondent should not have paid up the first amount of $527,039.37 to MIMB as it was under no obligation to do so on the ground that firstly upon termination of the lease agreement for non-payment of rentals due, only the rental amounts due up to the date of the termination were payable and no more and that secondly the guarantee undertaking given by the respondent to MIMB did not entitle the latter to recover damages and losses beyond the rentals which had fallen in arrears and that thirdly MIMB should have acted under its sale agreement by asking the respondent to purchase back the equipment at an agreed price of $45,442.80.

As regards the first ground, counsel for the appellant relied upon *Financings Ltd.* v. *Baldock*[2] in which it is held that in an agreement of hiring an owner who terminates the agreement for non-payment of rentals by the hirer cannot recover damages and losses other than the rentals which have fallen in arrears,

unless the hirer had evinced an intention to repudiate the agreement. Although the *Financing's* case deals with a hire-purchase agreement, the language of Denning L.J. in that case seems wide enough to cover cases of other hiring, such as leasing in which the hirer is not given any option to acquire the hired object. But in the circumstances of the case before us we are of the view that the principle established in *Financing's* case has no application because of a number of reasons.

In its letter to the appellant dated June 2, 1975 MIMB spelt out the terms upon which it was prepared to enter in the leasing arrangements one of which is set out as follows: —

"In consideration of MIMB agreeing to enter into the lease agreement with the Company in respect of the said machinery, L.J. shall guarantee the due payment to MIMB of all sums of money as shall from time to time become due and payable by the Company and shall also indemnify MIMB against all losses, damages costs and expenses incurred or suffered by MIMB. L.J. also undertake to purchase the said machinery from MIMB upon premature termination of the agreement."

The references to "the company" and to "L.J." are references to the appellant and the respondent respectively. This term was accepted by the appellant on June 9, 1975 and by the respondent on June 5, 1975, and was thereafter incorporated in Clause 6, 9 and 12 of the General Conditions of Leasing which were annexed as an integral part of the lease agreement signed by the appellant and MIMB. Clause 6 provides that:

"The hirer *shall indemnify* the owner against all claims made and proceedings brought against the owner and all liability *losses damages costs and expenses* incurred or sustained by the owner arising out of or consequent upon any non-observance or breach by the hirer of any obligations...."

The references to the hirer and the owner are references to the appellant and MIMB respectively.

Clause 9 provides that: —

"Upon the expiration or earlier termination of the agreement the hirer shall, if required by the owner deliver up the equipment to the owner....

PROVIDED that nothing herein contained shall prejudice the right of the owner in the event of termination of the hiring by the owner under clause 9 hereof to recover from the hirer *all rent and any other moneys* payable hereunder due at the date of such termination *and all damages which the owner shall have suffered by reason of or arising out of such termination.*"

Clause 12 provides that: —

"The owner shall be entitled to recover from the hirer *all costs charges and expenses incurred by the owner in connection with or in consequence of termination of the hiring by the owner* under Clause 9 hereof or any default by the hirer in performing or observing these terms or those of the agreement."

The reference to termination under Clause 9 referred to in the proviso to Clause 9 and in Clause 12 is clearly a misdescription, because neither of these two clauses deal with termination of the lease agreement. Clause 9 deals with the delivery and taking possession of the leased equipment upon termination of the agreement and both the proviso to Clause 9 and Clause 12 deal with the right of MIMB to recover losses damages costs and other expenses in the event of such termination. The only clause dealing with termination is Clause 8. Thus the reference to termination under Clause 9 referred to in the proviso and in Clause 12 must and should properly be referred to the termination under Clause 8.

However, be as it may, it is clear from these three clauses and from the terms contained in MIMB's letter dated June 2, 1975, which terms were accepted by both the appellant and the respondent that the intention of the parties was that MIMB was to be compensated not only for all sums of money which would become due and payable by the appellant but also for "all losses, damages costs and expenses" suffered by MIMB. The letter and these three clauses by stipulating that sums other than rentals due are recoverable therefore make the *Financing's* case inapplicable to the case under the present appeal, and as such the amount of $527,039.37 which the respondent paid as a cash price settlement for the equipment on February 11, 1977 was in fact the amount which the appellant itself was bound to pay under the lease agreement. In fact the appellant was informed of this fact by MIMB in its letter to the appellant dated March 22, 1976, and the respondent was offered back the equipment on the stated cash price settlement only in the event that the appellant was unable to pay MIMB the said cash price settlement by April 1, 1976.

Counsel for the appellant further submitted that under its guarantee undertaking to MIMB the respondent was not bound to pay the sum which it finally paid. Consequently the respondent had no right of recoupment of this amount against the appellant except a sum representing four month's rentals which had fallen in arrears before the termination of the lease agreement. Counsel argued that the respondent's undertaking to MIMB was not a contract of indemnity but one of guarantee. In our view there is no force in this argument because it is clear from MIMB's letter spelling out the terms of the proposed leasing arrangements and also from the lease agreement and the respondent's undertaking executed subsequently that these three parties intended that MIMB should have recourse against the respondent not only as regards non-payment of rentals by the appellant but also as regards all losses damages costs and other expenses which MIMB had incurred or suffered as a result of termination of the leasing. Further the undertaking given by the respondent makes it clear that it consists of (a) a guarantee and (b) an indemnity. The terms of this undertaking are set out as follows: —

"We hereby *guarantee* the due payment of rentals and all other sums of money which may become payable by hirer under the said lease and the due performance and observance of the said terms and conditions by the hirer therein contained and *undertake to indemnify* you against all losses damages costs and expenses which you may sustain or pay by reason of the neglect or further by the hirer to observe or perform any of the said terms and conditions."

The references to "we", "you" and "the hirer" are references to the respondent, MIMB and the appellant respectively. As the undertaking consists of (a) a guarantee for the payment of rentals and (b) an indemnity against all losses damages costs and expenses, we fail to see how the respondent could not be bound to pay MIMB sums of money other than an amount of four months rentals which had fallen due before the termination. It is all the more difficult to under-

stand counsel's argument because the terms of this undertaking were accepted and consented to by the appellant, whatever the juridical differences between a guarantee and an indemnity may be. Further these terms were the ones upon which MIMB was only prepared to enter into leasing arrangements without which leasing arrangements would have aborted.

It is true that this undertaking went beyond the guarantee contemplated by the appellant and the respondent in their agreement of April 25, 1975 and the subsequent charges of the appellant's lands to the respondent executed pursuant to the agreement in that the undertaking finally given was without any financial limit whereas the guarantee contemplated by the agreement and the charges set up the limit of the guarantee to be $454,428 and that further the guarantee contemplated by the agreement and the charges made no reference to any indemnity at all. It is only a guarantee for non-payment of rentals pure and simple. The answer to this argument in our view is very simple. The agreement of April 25, 1975 and the subsequent charges were executed by the parties before MIMB spelt out its terms of its willingness to enter into the leasing arrangements. The leasing arrangements were a three-party agreement, whereas the agreement of April 25, 1975 and the charges were bilateral. Thus when the appellant and the respondent subsequently accepted the terms so spelt out by MIMB and the legal leasing instruments were executed, the guarantee contemplated by the agreement of April 25, 1975 and the charges must be regarded as having been varied by the addition thereto of an indemnity in favour of MIMB against all losses damages costs and expenses which it suffered or incurred. This is in fact the very basis upon which MIMB entered into the leasing arrangements. Thus the financial limit set and the guarantee contemplated by the agreement of April 25, 1975 and the subsequent charges executed pursuant thereto must give way to or be superseded by the guarantee and indemnity undertaking given by the respondent on September 19, 1975 in pursuance of the agreed leasing arrangements. That being the case, we fail to see how the respondent should be bound to pay MIMB an amount of four month's rentals only. We therefore agree with the learned judge below that the amount of $527,039.37 paid by the respondent to MIMB was legally due under its guarantee and indemnity undertaking in pursuance of the leasing arrangements. Section 93 of the Contracts Act is an additional authority for this decision.

Counsel for the appellant next submitted that MIMB should not have recalled its finance by requiring the respondent to pay the amount of cash price of the equipment but should have asked the respondent to repurchase the equipment under the sale agreement of September 19, 1975 which it entered into between itself and the respondent. It is recalled that one of the features of the leasing arrangements was that the appellant as a hirer was given no option to acquire the hired equipment at all. This option was given by MIMB in the sale agreement to the respondent who should purchase the equipment either at the end of the leasing period or at its earlier termination. The price of the option was stated to be $45,442.80 — i.e. 10% of the original price, irrespective of whether the option was exercisable at the expiration of the lease agreement or at its earlier termination.

Clause 1 of the agreement states:

"The seller agrees to sell to the buyer and the buyer agrees to buy from the seller the equipment upon the owner determining the leasing of the equipment or upon the expiry of effluxion of time of the term of hiring under the lease."

Clause 2 continues:

"The price of the equipment shall be Malaysian Dollars Forty Five Thousand Four Hundred and Forty Two and cents eighty ($45,442.80) only and shall be payable by the buyer to the seller on the day following the date on which the owner shall determine the lease or the expiry date of the term of hiring under the lease. Upon payment of the said price in the manner aforesaid property and risk in the equipment shall pass from the seller to the buyer."

The references to "the seller" and "the owner" are references to MIMB and the reference to "the buyer" is a reference to the respondent. Counsel for the appellant made full use of this agreement arguing that if at all, the appellant should only be liable to the extent of the agreed sale price of $45,442.80 as this was the amount which the respondent itself was bound to pay MIMB to acquire back the equipment. The learned judge rejected this submission and we respectfully agree with his decision.

In this case the leasing arrangements consisted of (a) the terms which must be agreed to by all three parties and (b) those which are between two parties only. The tripartite terms are those that deal with the payment of rentals, the performance of obligations under this lease agreement and the guarantee and indemnity undertaking, whilst the bilateral term, *inter alia,* is the option to dispose of the equipment by MIMB at the end of the leasing or at its earlier termination. Disposal of the equipment is thus only a matter between MIMB and the respondent; the appellant as a hirer having no option to acquire the equipment at all. Thus if MIMB upon termination of the lease agreement elected not to act upon the sale agreement, we cannot see how the appellant could complain as it obviously had a right of recalling the finance under the lease agreement and the undertaking. In fact in the computation of cash price of the equipment, the value of the option was taken into consideration. Further if the equipment was sold back to the respondent at the price of $45,442.80 to the end of five months' leasing, MIMB having paid for the equipment a sum of $454,428 would have incurred losses by our simple computation, exclusive of loss of profit, at least in the sum of $408,985.20. This figure is arrived at by subtracting the value of the option ($45,442.80) from the original purchase price of the equipment ($454,428) paid by MIMB at the start of the leasing. If we add to this amount the sum of four months rentals which had fallen in arrears and penalty interest thereon, the loss incurred by MIMB would have been $454,579.25 exclusive of elements of loss of profit. As it can be seen, the figure which we calculated is not far from the cash price computed by MIMB, which was $483,244.43 if settled on April 1, 1976 and of $533,985.10 if settled on April 1, 1977. In the circumstances we cannot see how MIMB's right to re-

cover losses from the respondent should only be limited to $45,442.80 as this was nowhere near the actual losses that it suffered. In our view the so called sale price of $45,442.80 fixed by the sale agreement is not the agreed loss to which MIMB's right to recover is limited so that it is precluded from recovering a higher sum. Further if we read the sale agreement, the lease agreement and the guarantee and indemnity undertaking together as one instrument we would find nothing in them which would justify us to conclude that MIMB could only recover $45,442.80. In our view the submission therefore fails.

Consequently we agree with the learned judge that the respondent is entitled to the recoupment of the first amount of $527,039.37 representing the losses damages costs and expenses suffered or incurred by MIMB, which the respondent in turn had paid MIMB.

As regards the second amount of $165,660.73 representing the respondent's own losses damages costs and expenses, this amount consisted of (a) interest paid in respect of a loan taken in order to pay the first amount to MIMB (b) repossession expenses (c) fire insurance premium (d) store rentals (e) transportation of the repossessed equipment (f) legal fees, and (g) advertisement for sale of the equipment. These are all losses which flowed from the default of the appellant in paying the rentals, which eventually led to the termination of the lease agreement. We thus agree with the learned judge that the respondent was entitled to recover these losses from the appellant under section 74 of the Contracts Act, 1950.

The appeal is therefore dismissed with costs. The deposit is to be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Skrine & Co.*

WEARNE BROTHERS MALAYSIA SDN. BHD. v. GURDAVE KAUR & ANOR; BAHARUDDIN, BERNATT, TAN & KER (as Garnishees)

[O.C.J. (Ajaib Singh J.) August 23, 1979]
[Seremban — Civil Suit No. 276 of 1976]

Practice and Procedure — Garnishee proceedings — Undated notice of garnishment — Effect of — R.S.C. 1957, O. 43 r. 5 & O. 45.

The judgment creditors had sued the judgment debtors as the administratrix and administrator of the estate of Gurcharan Singh (deceased) for a sum of $8,028.18 under a hire-purchase agreement made between the judgment creditors and the deceased in respect of a motor vehicle. Subsequently a consent judgment for this sum was entered against the judgment debtors on May 9, 1977. Earlier in 1974 the judgment debtors had retained the garnishees, a firm of advocates and solicitors to obtain Letters of Administration and these were granted to them on December 13, 1976. Since then a sum of $55,344.85 due to the deceased's estate from Malaysian Co-operative Insurance Society Ltd. was paid to the garnishees.

On January 2, 1979 an undated garnishment notice was served on the garnishees. This was followed by a garnishee summons dated April 13, 1979 and served on May 3, 1979 on the garnishees.

The garnishees sought to set aside the said Notice and summons as they claimed that there were no debts owing or accruing from them to the judgment debtors, that they were not beneficially entitled to any attachable property which may come under the control of the garnishees and that the garnishees had no property of the judgment debtors in their custody or control.

Held, dismissing the garnishees' application: (1) the court has jurisdiction to set aside a garnishment notice or a garnishee summons but it should do so only on being satisfied by cogent evidence that such notice or summons was not issued *bona fide* and that the issue thereof was an abuse of the process of the court;

(2) the garnishees in this case failed to show why the procedure as set out in the rules relating to garnishee proceedings should not be adhered to and they also failed to show that they were not answerable to the garnishment notice or the garnishee summons. Although the garnishees had asserted positively that there was no debt owing or accruing from them to the judgment debtors they were not in a position to say categorically that no other attachable property belonging to the judgment debtors would come into their hands;

(3) unlike some other prescribed forms including the one for a garnishee summons there is no requirement that a garnishment notice should be dated. There is therefore no merit in the contention that the garnishment notice should be set aside because it was undated;

(4) the notice and summons were issued *bona fide* and were not an abuse of the process of the court.

CIVIL SUIT.

J.G. Bernatt for the garnishees and judgment debtors.

Leow Shin Fong for the judgment creditors.

Cur. Adv. Vult.

Ajaib Singh J.: This was an application by the garnishees to set aside a garnishment notice and a garnishee summons issued and served on them at the instance of the judgment creditors. The grounds on which they sought to set aside the aforesaid notice and summons were that the garnishees had no debts owing or accruing from them to the judgment debtors, that the judgment debtors were not beneficially entitled to any attachable property which may come under the control of the garnishees and that the garnishees had no property of the judgment debtors in their custody or control.

The facts leading to the present application were as follows. The judgment creditors had sued the judgment debtors as the administratrix and administrator of the estate of Gurcharan Singh (deceased) for a sum of $8,028.18 under a hire-purchase agreement made between the judgment creditors and the deceased in respect of a motor vehicle. Subsequently a consent judgment for this sum was entered against the judgment debtors on May 9, 1977. Earlier in 1974 the judgment debtors had retained the garnishees who are a firm of advocates and solicitors to obtain Letters of Administration and these were granted to them on December 13, 1976. A sum of $55,344.85 due to the deceased's estate from Malaysian Co-operative Insurance Society Ltd. was thereafter paid to the garnishees who in turn had the sum deposited in Bank Buruh on February 25, 1977 in an account opened for the estate. An undated garnishment notice was served on the garnishees on January 2, 1979